No. 86-842

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

SHILEY INCORPORATED,
Appellant,
VS.
JAMES FOGARTY CORRIGAN, BRETT JAMES CORRIGAN,
and SCOTT GRANT CORRIGAN,
Appellees.

On Appeal from the California Court of Appeal

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF FOR CALIFORNIA CHAMBER OF COMMERCE AND HEALTH INDUSTRY MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of this Court, the California Chamber of Commerce and the Health Industry Manufacturers Association respectfully move this Court for leave to file a brief amicus curiae in support of the appellant in the above-captioned case. Appellant's counsel has consented to the filing of this brief but appellees' counsel has not.

This case is of great importance to movants and to those they represent. International products liability problems are a major source of litigation against American manufacturers. Frequently, the grant or denial of a forum non conveniens motion dictates the entire course of the subsequent litigation and even its eventual outcome. Movants respectfully suggest that the issue in this case represents an industry-wide concern such that the views of American manufacturers at large are appropriately relevant. In particular, certain of the amici seek to
represent the views of defendants not incorporated in Califor-

nia but otherwise subject to jurisdiction there. Moreover, movants' concerns extend well beyond the present case, to other California decisions discussed below that establish per se rules similarly prohibiting dismissal.

For the reasons stated above, as well as those set forth in the attached brief amicus curiae, movants respectfully request this Court to grant their motion for leave to file the accompanying brief amicus curiae supporting recognition of probable jurisdiction and reversal of the opinion of the court below.

December, 1986

Respectfully submitted,

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BRIEF AMICUS CURIAE OF CALIFORNIA CHAMBER OF COMMERCE AND HEALTH INDUSTRY MANUFACTURERS ASSOCIATION

INTERESTS OF AMICI CURIAE

Amicus curiae California Chamber of Commerce ("the Chamber") is a voluntary, non-profit, California-wide business association, with more than 3,800 members from virtually every industry and geographic section in the state. Ninety percent of the members are small or medium-size businesses. Sixty-eight percent of the Chamber's membership have fewer than 100 employees. The Chamber's membership also includes 160 trade associations, and it is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

Thirty-three percent of the Chamber's members export products outside the United States. Forty-two percent of the

Chamber's members compete in the United States with foreign products. In 1985, California's two-way trade was worth approximately $94 billion, equal to roughly 18 percent of the state's total output. California's third leading export market in 1985 was Australia at $3.0 billion. Foreign trade through California accounts for more than 15 percent of all foreign trade nationally.

The Health Industry Manufacturers Association ("HIMA") is a national trade association representing over 300 manufacturers of medical device and diagnostic products. The medical device and diagnostic industry represents over $17 billion in annual sales, provides employment for 190,000 Americans, and in 1985 exported $2.5 billion worth of all kinds of medical device products and had a trade surplus of $676,000,000. The industry is made up primarily of small, entrepreneurial companies.

Over the years, HIMA's goal has been to improve patient care through encouraging advancement of medical technology and to foster the availability of such products for worldwide distribution and use. Anticipated consumer litigation already has a significant and increasingly important impact on manufacturers' decisions to develop and market medical devices. As a major exporter of medical products, the resolution of disputes involving foreign-based consumers of health care is a significant issue to the medical device industry. Recognizing the legitimacy of other nations' efforts to shape their respective public policies is especially critical in the area of health care where even a minor restriction in the availability and affordability of medical products can have significant consequences on the delivery of health care.

The ruling of the California court below threatens to make litigation of products liability cases arising out of foreign trade extremely difficult. Whatever the difficulties of defending domestic products liability actions in California, the magnitude of the problems inherent in defending comparable international products liability cases is many times greater.

The present case illustrates these difficulties; where the injury occurs in another nation, the defendant may be totally deprived of a valid substantive defense because of inability to obtain testimony from third parties who bear the real responsibility for the injuries in question. In medical malpractice/products liability cases this is especially important considering the paramount role of health care providers, physicians, and hospital employees who use — or in some cases misuse — medical products. In holding that a dismissal or stay is not appropriate where a change in law would result, California renders all American manufacturers subject to suit in California vulnerable to litigation that is not only extremely inconvenient but highly unfair. This unfairness is most extreme where the defendant is not incorporated locally, even though subject to jurisdiction; in such cases, the defendant lacks even the consolation of suit in its own home state.

Amici's interests are directly implicated because if this Court declines to reverse the opinion below, further appellate review of such issues will be effectively precluded. First, California trial judges are unlikely to exercise their discretion to dismiss actions where a change in law will result if the ruling below is allowed to become established in California jurisprudence. If trial judges exercise their discretion to retain jurisdiction, the issue will not then be suitable for appellate review, since it would not normally be an abuse of discretion for the trial judge to refuse to dismiss. Second, the implications of this case extend far beyond California. If this Court declines to review this case for want of a substantial federal question, or if it notes probable jurisdiction and affirms the opinion below, this would establish a precedent that forum non conveniens is purely a matter of state law, not governed by its holding in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981). The consequence would be the complete unavailability of this Court's appellate scrutiny of state forum non conveniens doctrine, no matter how blatantly it both refuses to consider the interests of American trading partners and denigrates the integrity and competence of their courts.

It is therefore in amici's interests that, in the event that this Court does not note probable jurisdiction and reverse the opinion of the court below, the appellant's jurisdictional statement be treated as a petition for certiorari rather than being dismissed for want of a substantial federal question. 28 U.S.C. § 2103.

SUMMARY OF ARGUMENT

In the opinion below, the California appellate court explicitly declined to follow this Court's decision in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981). Citing *Holmes v. Syntex Laboratories, Inc.,* 156 Cal.App.3d 372, 381, 202 Cal.Rptr. 773 (1984), it stated that California attaches far greater significance to the possibility of an unfavorable change in applicable law resulting from a forum non conveniens motion than the *Piper* rule permits. It disagreed, moreover, with the *Piper* holding that the possibility of an unfavorable change in law is not relevant unless the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all. 182 Cal.App.3d 176-77, citing *Piper, supra,* 454 U.S. at 254. It then performed its own choice of law analysis and concluded that California law should be applied.[1] The only possible basis for its analysis and result is its belief that *Piper* has no relevance to the California law of forum non conveniens.

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[1]The court below disagreed, however, with the *Holmes* opinion to the extent that *Holmes* suggested that the issue is solely which forum is most advantageous to the plaintiff. 182 Cal.App.3d at 178. It nevertheless concluded its choice of law analysis with the observation that "[u]nder these circumstances, California law would be applicable if trial were held here, and the analysis of our 'governmental interest' in the case argues in favor of a California forum." 182 Cal.App.3d at 180. The other reason offered for considering the trial judge's decision an abuse of discretion was that the defendant was a local manufacturer, 182 Cal.App.3d at 180-82, a factor that was also present in *Piper.* All other considerations were neutral as between trial in California and trial in Australia; *see note* 7 *infra.* It is completely clear, therefore, that the result is contrary to *Piper.*

Yet in international products liability litigation, this Court's decision in *Piper* is as relevant in state as in federal courts. State courts are bound by *Piper* because it is a doctrine of federal common law, necessitated by the paramount federal interest in foreign relations and trade. *Piper* is federal common law because forum non conveniens requires a determination of the suitability of an alternative foreign forum, the recognition of the interests of the alternative forum in entertaining the action locally, and the preservation of the trial judge's authority to take both of these considerations into account. The *Piper* doctrine is relevant only to international, and not interstate, litigation; and as a doctrine with foreign relations implications it pre-empts contrary state law.

The ruling below also violates the "dormant" foreign commerce clause and foreign relations powers. Even in the absence of a contrary federal rule of decision, state law that interferes with international commerce or relations is invalid. If forum non conveniens in international litigation were simply a matter of state law, then this Court would lack jurisdiction to scrutinize even the most egregious state court refusals to defer to foreign interests and the most disrespectful condemnations of the judicial systems of alternative fora. Given the important political and foreign policy overtones of current international tort litigation, it is essential to preserve the possibility of federal oversight of state doctrines of forum non conveniens.

ARGUMENT

1. This Court's decision in Piper Aircraft Co. v. Reyno is binding in international products liability actions brought in state court.

The present dispute presents squarely an issue that this Court has explicitly reserved on at least three occasions, namely the source and scope of its doctrine of forum non

conveniens.[2] Is the doctrine federal in its origins, or is it a product of state law? And if it is federal, does it extend to litigation brought in state court as well as actions brought in federal court? The court below, 182 Cal.App.3d at 177, acknowledged that California accorded a far greater significance to a change in law than was consistent with *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981). If this Court's forum non conveniens decision in *Piper* is federal law that is binding in state courts, then the contrary assumption below that a state court might adopt a different state rule of forum non conveniens must clearly be reversed.

On this issue there is substantial confusion in the lower courts, both state and federal. Some federal courts have held that a federal rule should be applied in federal court, *see, e.g., Sibaja v. Dow Chemical Co.,* 757 F.2d 1215, 1219 (C.A. 11, 1985); others that they are bound in federal court by state door closing rules, *see, e.g., Ramirez v. Autobuses Blancos Flecha Roja,* 486 F.2d 493 (C.A. 5, 1973). Some state courts have treated this Court's pronouncements as federal law that has no automatic application in state courts, *Holmes v. Syntex Laboratories, Inc.,* 156 Cal.App.3d 372, 202 Cal.Rptr. 773 (1984) (deciding not to follow *Piper*); *Bergquist v. Medtronic, Inc.,* 379 N.W.2d (Minn. 1986) (deciding to adopt *Piper* rule into Minnesota law); others have cited United States Supreme Court cases without explicitly addressing the issue of whether they were binding or merely persuasive, *Dominicana v. Garcia,* 478 So.2d 873 (Fla.App. 3 Dist. 1985); *Joly v. Albert Larocque Lumber Ltd.,* 489 N.E.2d 698 (Mass. 1986).

This variety of possible outcomes arises out of the jurisprudence underlying *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). Speaking analytically, there are three different possibilities. The issue might be governed by state law in both

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[2]*Piper Aircraft Co. v. Reyno,* 454, U.S. 235, 248 n. 13 (1981) (unnecessary to address whether forum non conveniens doctrine was state or federal); *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.,* 330 U.S. 501, 509 (1947); *Williams v. Green Bay & W.R.R.,* 326 U.S. 549, 558-59 (1946).

court systems; the issue might be governed by federal law in both court systems; or each court system might be free to use its own set of rules. This last possibility would arise if the issue were deemed procedural, in which case lex fori would govern. The first two alternatives would be possible if the issue were instead deemed substantive. If substantive, the issue would be governed by federal rules if *Piper Aircraft v. Reyno* is a doctrine of federal common law, or by state rules otherwise. In international products liability cases, it is submitted, the best analysis is that forum non conveniens is a matter of substantive federal common law.

The *Piper* doctrine, first, is a matter of federal and not state law. In theory, this Court has reserved the issue of the source of the doctrine. 454 U.S. at 248 n. 13. The state law explanation is somewhat implausible, however. First, it would seem highly unusual for this Court to have reviewed the decision if nothing more was involved than scrutiny of the Court of Appeals' resolution of a state law issue.[3] Moreover, the *Piper* opinion in no way resembles an interpretation of state law. It relies upon federal, not state, cases. More perplexing still is the suggestion that the reason for failing to address the issue was that the relevant law was the same. Since at that point it was unclear how the precise issue would be decided by this Court, it seems unlikely that the reason for failure to address the issue was simply the congruence of the outcome under the different sets of laws. At that point, it was unclear what the outcome under any of the various laws would be.[4]

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[3]While such scrutiny is jurisdictionally appropriate under 28 U.S.C. § 1254(1), it would be surprising for such an issue to satisfy the criteria for deciding grants of certiorari. Sup. Ct. Rule 17.1.

[4]This Court stated that the Court of Appeals had also held that the laws of the concerned jurisdictions were identical. 454 U.S. at 248 n. 13. It then went on, however, to reverse the Third Circuit's rule of law. If the Third Circuit thought that the rules were identical, therefore, then after the reversal the rules would have been diametrically opposed.

The more plausible interpretation of the footnote, therefore, is that the issue is one of federal law. It is unnecessary to examine any state court authority if the issue is to be decided according to federal precedents and policies. The conclusion that *Piper* is a holding of federal law, however, does not by itself resolve the second part of the problem, namely whether it is binding in state as well as federal court. If *Piper* is merely a procedural holding, then state courts are free to follow their own contrary rules because on rules of procedure lex fori governs. If *Piper* is, in contrast, a ruling of federal common law, then it is binding in state court as well.

Several considerations militate against the conclusion that forum non conveniens is merely a procedural doctrine, to be determined according to the law of the forum. First, as this case illustrates, the consequences of a forum non conveniens dismissal may include a change in the applicable law. *Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487 (1941) made clear, however, that the applicable law ought not to depend on whether an action was brought in state or federal court. Different choice of law results offend directly the "twin aims" of *Erie Railroad,* namely the equal administration of laws between residents and non residents, and the discouragement of forum shopping. *Hanna v. Plumer,* 380 U.S. 460, 468 (1965).

Second, the policies underlying the forum non conveniens doctrine do not all relate to the administration of justice in the courts. If all that were involved were the forum's management of its docket, then it would be arguable that a mere procedural issue was at stake. But several non-procedural policies are also implicated. One is the protection of defendants from vexatious litigation in inconvenient fora. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947) (plaintiff may not harass or oppress defendant). Another is the interest of the alternative forum of adjudicating a case in which it has a superior interest. *Piper, supra,* at 260. In citing these purposes as central to the forum non conveniens inquiry, this Court ex-

pounded doctrine that cannot be confined within the cramped "procedure" rubric.

Third, and most important, the policies underlying *Piper* are federal policies that would be thwarted if state courts were free to ignore them and go their own way. It is for this reason that *Piper* is properly characterized as a doctrine of federal common law. As Judge Friendly expressed it,

> *Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum and is therefore predictable and useful as its predecessor, more general in subject matter but limited to the federal courts, was not.

Friendly, *In Praise of Erie — And of the New Federal Common Law,* 39 N.Y.U.L. Rev. 383, 405 (1964). The touchstone of this federal common law is some "national concern" which renders appropriate the supplanting of state decisional or statutory law by a uniform federal rule. This national concern is amply demonstrated by the federal policies underling the opinion in *Piper.*

2. Forum non conveniens motions in international products liability cases implicate important federal policies concerning the conduct of foreign relations and commerce.

Piper Aircraft v. Reyno is of relevance only to international disputes. As between federal courts in the United States, objections to an inconvenient forum are dealt with pursuant to the federal transfer statute, 28 U.S.C. § 1404(a). The decision must therefore be understood as dealing with the special problems of transnational litigation; its references to policies peculiar to the international context highlight this emphasis. 454 U.S. at 252 (detailing problems of international forum shopping for American law and warning of flood of foreign litigation). The special federal concern with international relations and trade explains why issues of international rela-

tions are treated as matters of federal common law, on which the state are not entitled to pursue their different opinions. *Texas Industries Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641 (1981) (listing international affairs as appropriate subject of federal common law). *Cf. Her Majesty, Queen in Right, Etc. v. Gilbertson,* 597 F.2d 1161 (C.A. 9, 1979) (suggesting that state judgments law may be pre-empted in international cases because of foreign relations overtones).

That Supreme Court determinations of international law are federal common law binding in state as well as lower federal courts is recognized by the Restatement (Revised) of Foreign Relations Law §§ 131, 132(2), (Tent. Draft 6, 1985). "It would be unsound as well as unwise to make our state courts our ultimate authority for pronouncing the rules of international law." Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law,* 33 Am. J. Int'l L. 740 (1939) *cited in Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 425 (1964). *Sabbatino* is one such example where this Court developed a rule of federal common law, the "act of state" doctrine, which was binding in state and federal courts alike. That doctrine, an international analog of sovereign immunity, Restatement (Revised) of Foreign Relations Law § 469, Reporter's n. 11, is based upon the respect that every sovereign state owes to every other. *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897). While states of the United States retain considerable latitude in determining whether to recognize the sovereign immunity of sister states, *Nevada v. Hall,* 440 U.S. 410 (1979), the extent of deference and comity due to foreign nations is for the federal government to decide.

There are several respects in which applications of the forum non conveniens doctrine to international litigation raise serious foreign policy concerns. First, as a threshhold matter, dismissal on forum non conveniens grounds is typically predicated upon the existence of an adequate alternative forum. *Piper, supra,* 454 U.S. at 254, n. 22. This threshold issue plunges the forum court into an evaluation of the judicial systems of other nations, including possibly our allies. The

point is not merely that this is not a matter on which there should be fifty-one different answers, although clearly this is an issue on which the nation ought to "speak with one voice." *Cf. Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 453 (1979). More important still, it is simply not for the state of California to pass judgment on the judicial systems of other nations. This is instead a matter for federal determination, since if a foreign nation were to protest or retaliate the repercussions would be experienced nationwide. *Japan Line, supra,* 441 U.S. at 450 n. 16. One lower California court's clumsy efforts to rebuke Great Britain for its failure to adopt strict products liability law demonstrate how detrimental to foreign policy such evaluations might become.[5] If such evaluations were decided to be a matter of state law, this Court would lack the authority to review them.

A second respect in which forum non conveniens involves issues of foreign policy concerns deference to the interests of the alternative forum in adjudication of cases arising there. This Court has recognized on several occasions that one factor involved in the determination whether to dismiss is the interest of a local court in litigating a cause of action arising locally. *Piper, supra,* at 260; *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 509 (1947). Such considerations resemble the comity and deference concerns underlying the act of state doctrine just discussed; in fact the two doctrines are similar in that both act of state and forum non conveniens involve relinquishing juris-

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[5]The court in *Holmes v. Syntex Laboratories, Inc.,* 156 Cal.App.3d 372, 202 Cal.Rptr. 773 (1984) spent approximately five pages of its opinion reviewing the work of British scholars and law review commissions critical of British tort law, concluding that "British courts are not a *suitable* alternative." 156 Cal.App.3d at 383 (emphasis in original). The court observed that "if the present litigation occurs in Britain, appellants will not simply lose their cause of action for strict liability, they will be forced to litigate under a system of negligence law *that the British themselves have condemned as inadequate.*" 156 Cal.App.3d at 387 (emphasis supplied). The California court apparently felt more in touch than the British Parliament with what "the British" really wanted.

diction out of deference to a nation with a superior interest. Again, it seems unreasonable to allow each state of the United States to decide for itself how much comity to accord foreign nations, in particular to our allies and trading partners. If determined to be a matter of state law, this Court would have no basis for reviewing even a flat out refusal to extend any deference whatsoever to the preferences and interests of other nations, no matter how strong those preferences, how reasonable those interests, nor how important the issue to federal conduct of foreign affairs.

In the very case at hand, that is essentially what California has done. Based upon consideration of all of the factors, the trial court determined that application of the forum non conveniens doctrine was appropriate. The appellate court reversed under an abuse of discretion standard, primarily because if the case were heard in Australia a different law would be applied. This amounts to a virtual per se rule that dismissal is inappropriate when the alternative forum would be likely to apply its own, rather than California, law.[6] The court's citation to *Holmes v. Syntex Laboratories,* 156 Cal.App.3d 372, 202 Cal.Rptr. 773 (1984), a California case that explicitly refused to follow *Piper Aircraft v. Reyno,* suggests that California trial courts will rarely if ever be free to defer to the interests of foreign nations when those nations might choose to diverge from California's choice of its own law.[7] Yet it is in precisely

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[6]Another California court established a per se rule that dismissal is inappropriate where the plaintiff is a resident. *Archibald v. Cinerama Hotels,* 15 Cal.3d 853, 126 Cal.Rptr. 811, 544 P.2d 947 (1976). *Cf. Piper* at 255 n. 23 (dismissal should not be automatically barred where plaintiff has filed suit in home state). *Cf.* N.Y. General Oblig. Law § 5-1402 (McKinney's) (prohibiting dismissal where more than one million dollars at stake and New York law has been chosen).

[7]The court below purported to disagree with the *Holmes* court's holding that the decision is simply one of which forum is most advantageous to the plaintiff. 182 Cal.App.3d at 178. However, it did not deny the great importance that it attached to the choice of law inquiry. Furthermore, in its analysis almost all of the other factors that it examined turned out to be

those circumstances (i.e., when the alternative forum would prefer to apply its own law) that the alternative forum is likely to have the deepest concern, since its decision to apply its law is a sign that it recognizes a serious interest in the case.

This point illustrates the third respect in which this Court's decision in *Piper* reflects foreign policy concerns. Forum non conveniens, as developed in that opinion, is first and foremost a discretionary doctrine. A trial court's determination is to be evaluated only under an "abuse of discretion" standard. *Piper*, 454 U.S. at 249 (emphasizing need for discretion and flexibility). This flexibility provides the trial judge with the latitude to take into account extraordinary circumstances, which would be impossible under a rigid per se rule. The test which the California appellate courts have applied to forum non conveniens motions neither makes adequate reference to the need for deference to other nations' interests nor leaves the trial judge the flexibility to incorporate such considerations in any suitable fashion.

The need for flexible sensitivity to the foreign policy implications of forum non conveniens issues is illustrated by the well known example of the Bhopal litigation. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December*

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evenly balanced. It first dismissed several factors as "neutral," such as the preferences of the parties, the statutes of limitations, and the convenience of parties and witnesses. 182 Cal.App.3d at 174-75. With regard to the factors of "substantial disadvantage to any party and avoidance of multiple actions" the court noted substantial disadvantages to both parties in litigating in the disfavored forum, and denied the likelihood of third party liability. 182 Cal.App.3d at 182-183. The only factor, aside from choice of law, that broke the symmetry between California and Australia (and could thus account for the determination that there had been an abuse of discretion) was the in-state location of the manufacture.

California does, therefore, seem to be well on its way to a per se rule: namely that it is an abuse of discretion to dismiss if *either* a change in law will result, *or* the plaintiff is a resident, *Archibald v. Cinerama Hotels*, 15 Cal.3d 853, 126 Cal.Rptr. 811, 544 P.2d 947 (1976), *or* the defendant is a resident.

1984, 634 F.Supp. 842 (S.D.N.Y. 1986). Numerous suits were filed across this country, some in state and some in federal court, but the forum non conveniens issue was common to all. If *Piper* is anything other than a rule of federal common law, then unified treatment of all of these cases is simply impossible. Some such cases would be dismissed, some would not, depending entirely upon the fortuity of where the suit was filed. Moreover, each state would be entitled to express its own views of the adequacy of the alternative Indian forum, and to decide whether and how much deference to accord to Indian interests. There would, moreover, be no jurisdictional basis for Supreme Court review.[8] The impact that a "mere" forum non conveniens decision might have on foreign policy could hardly be more graphically illustrated.

The extent to which foreign policy concerns influence the issue of retention of jurisdiction is illustrated by an analogous problem, namely, the enforcement of forum selection clauses. As with both the act of state and forum non conveniens doctrines, forum selection clauses divest an otherwise proper forum of the authority to litigate a dispute. Sometimes the result is a change in law, for the alternative forum may take a different position on the applicable rule of decision. For example, in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) dismissal to the alternative forum (the London Court of Justice) would have resulted in the enforcement of an exculpatory clause that would have been invalidated at a trial in the United States. This Court nonetheless held that dismissal was required.

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes

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[8]While 28 U.S.C. § 1254(1) does allow certiorari jurisdiction over state law issues in diversity cases, the purpose is merely to allow consideration of whether the lower federal court decided the state law issue as the state would. If the forum non conveniens doctrine is a matter of state law, of course, this Court will not "reformulate" a state's law for it.

> must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9.

This holding was recently reiterated in a case involving an arbitration clause. *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth*, 105 S. Ct. 3346 (1985). Arguably, an international arbitrator would be less likely faithfully to enforce American antitrust law, which was the basis of the plaintiff's complaint. Yet this possibility was not sufficient to outweigh the parties' selection of international arbitration. While such an agreement to arbitrate would not be enforceable in an interstate American context, in an international context it had to be respected.

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

105 S.Ct. at 3375. *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

The international comity reasons for allowing the present litigation to go forward in Australia are evident. First, as in *Bremen*, insistence upon retaining jurisdiction in an American forum under American law would be detrimental to U.S. commercial interests: "the expansion of American business and industry [would] hardly be encouraged." Second, such insistence shows insufficient "respect for the capacities of foreign and transnational tribunals" under *Mitsubishi*. By treating the Australian forum as inadequate simply because it would apply its own law, California denigrates the judicial competence of our allies and trading partners.

Australia has chosen to apply negligence rather than strict liability law. It apparently also believes that it has an interest in applying its law to the present case, since the court below concluded that it would do so. 182 Cal.App.3d at 179. Australia may properly have concluded that Australian health and safety are better protected by encouraging importation of high-technology medical products than by discouraging it. It may also have concluded that Australians are better off having access to heart valves, whatever their dangers, than having no access at all. Heart valves, after all, are a product that is useful only to those who are already severely ill. Overall, it might be thought, heart valves increase the probability of survival. The advantages of having such products available for those who are still living might genuinely be believed more important than provision of a cause of action to the survivors. Australia penalizes negligent design and manufacture of such products, but stops short of imposing liability where no negligence occurred. It may very well have concluded that foreign manufacturers would hesitate to send products into the state when doing so would not only subject them to American strict liability law but also require them to defend such strict liability actions in a forum where access to necessary evidence is not possible.

If this Court were not to hear the present case, it might thereby forego all opportunities to adjudicate challenges to the California rule. In the present case, the trial judge exercised his discretion to dismiss the case but was reversed on appeal. Once a rule against dismissal is firmly ensconced, however, trial judges would be extremely unlikely to dismiss cases in such circumstances. A decision to retain jurisdiction would usually be shielded from appellate scrutiny even under this Court's standard in *Piper*, because of the difficulty in establishing an abuse of discretion. Influenced by a mistaken belief that dismissals were never appropriate where a change in forum would result in a change in law, trial judges would nonetheless couch their decisions in language reflecting a

variety of other relevant discretionary considerations, thereby precluding serious state appellate and Supreme Court review.

This case therefore presents a uniquely appropriate opportunity for this Court to resolve an issue that it deliberately left open in *Piper* and several other cases. Is the forum non conveniens doctrine delineated in this Court's decisions a doctrine of federal common law, binding in state courts as an instance of the federal power over foreign relations and commerce? Amici respectfully submit that plenary consideration is appropriate, and that this question should be answered in the affirmative.

3. The California rule of forum non conveniens is pre-empted under the constitutional grant to Congress of power over foreign relations and foreign commerce.

As just argued, this Court's decision in *Piper Aircraft v. Reyno* should be recognized as a doctrine of federal common law that pre-empts contrary state rules. Even if *Piper* had never been decided, however, the California rule would still be invalid. While federal rules always pre-empt contrary state rules under the Supremacy Clause, there are situations where state rules affecting commerce are unconstitutional even in the absence of directly conflicting federal decisional law or statute. In the context of interstate trade, this phenomenon is analyzed under the rubric of the "dormant" commerce clause. A similar doctrine operates where international commerce is concerned.

The domestic dormant commerce clause prohibits state actions that are unduly burdensome on interstate commerce, even where there is no conflicting federal regulation. This includes the invalidation of application of state regulatory rules to activities occurring out of state. *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 90 L.Ed.2d 552, 561-63 (1986). The international commerce clause, likewise, is offended where a state seeks directly to regulate international commerce. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

See generally, L. Henkin, *Foreign Affairs and the Constitution* 234 (1972). If anything, the international commerce clause is more restrictive than the interstate commerce clause. *Id.* at 472 n. 40. The reason is that in matters of international relations, it is important for this nation to "speak with one voice." *Japan Line, supra,* at 449, 453.

For this reason, one scholarly source lists the federal foreign relations power as a federal limitation on state court application of the forum non conveniens doctrine. E. Scoles and P. Hay, *Conflict of Laws* 372-73 (1982) (describing the foreign relations power under the heading "Federal Limitations on State Application of Forum Non Conveniens"). *See also Zschernig v. Miller,* 389 U.S. 429 (1968). Such limitations apply even in the absence of an explicit federal policy dealing with the matter at issue; *Zschernig v. Miller,* for instance, dealt with a state law regulating inheritance of local assets by citizens of Iron Curtain countries. Even though the federal government did not itself have a rule regulating such inheritance issues, the state rule was invalidated under the Supremacy Clause. Professor Henkin suggests that *Zschernig* is explainable as barring state actions that "reflect a state policy critical of foreign governments and involve 'sitting in judgment' on them." Henkin, supra, at 240. A determination that the alternative forum is unsuitable for the litigation certainly involves such a critical judgment. Thus the California rule at issue here would be invalid because of its impact on foreign commerce even if the *Piper Aircraft* case had never been decided.

The importance of the impact of the California rule on foreign commerce is particularly apparent under current conditions of international trade. The competitiveness of American manufacturing is currently in danger, even with regard to high technology products. The ability of American manufacturers to compete is, moreover, a *federal* priority. The insistence that American manufacturers be burdened not only with American law but with litigation in a forum where it is impossible to establish important sustantive defenses because

of lack of access to witnesses makes American products less competitive than they would otherwise be. Such insistence, furthermore, is out of keeping with the interests of the nations where injury might occur.

> Courts should recognize that the application of an American forum's law to controversies in which other countries have a vital interest is likely to offend the sovereignty or frustrate the public policies of those countries. Imposing our legal solutions on other nations, however beneficial when viewed from the perspective of individual litigants, impedes the opportunity for other legal systems to craft local solutions to their citizens' legal problems. If a foreign forum proves adequate and has the greater interest in the controversy, an American court can best serve the interest of justice by permitting justice to be done elsewhere.

Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 Texas L. Rev. 193, 223 (1985).

CONCLUSION

The foreign policy implications of a forum non conveniens dismissal should not be underestimated, even in private tort litigation. Not only do such regulations of American industry threaten to discourage American international trade to the detriment of local business, but such refusals to dismiss may be couched in language that denigrates the competence or integrity of the judicial systems of our allies and trading partners. Conversely, dismissals themselves may have foreign policy implications where a foreign government prefers that jurisdiction be retained. As one note writer has observed, "[t]he consequences of granting forum non conveniens dismissals in the Bhopal cases would be far reaching, both because of the number of litigants and the enormity of damages involved and because of the policy implications posed by a decision not to adjudicate these controversies in the United States." Note, *Foreign Plaintiffs and Forum Non Conveniens:*

Going Beyond Reyno, 64 Tex. L. Rev. 193, 194 (1985). As one of the plaintiffs' attorneys in that litigation argued, denial of access to U.S. courts in that case might lead to "outrage all over the world." Statement of David Jaroslawicz, cited in Stewart, *Suits Against Union Carbide Raise Issues for Lawyers, Multinationals*, Wall St. J., Dec. 17, 1984, at 35, col. 1.

Such policy concerns make forum non conveniens in international torts litigation a federal concern. Note, *supra* at 195 n. 13. If forum non conveniens is merely a matter of state law, this Court would not even be entitled to exercise jurisdiction to review such determinations. The problems inherent in giving state courts unreviewable discretion to pass judgment upon the judicial systems and laws of other nations and to disregard the legitimate concerns of allies and trading partners are surely apparent. Amici respectfully request that this Court note probable jurisdiction in the present case to consider whether such a result would be desirable.

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